

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERGINO L. SMITH,

Defendant-Appellant.

UNPUBLISHED

March 24, 2000

No. 208772

Wayne Circuit Court

LC No. 97-501994

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). He was sentenced to life imprisonment for the murder conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion by denying defendant's motion for severance because codefendant Williams' defense of duress was antagonistic to defendant's defense. The decision to sever or join defendants lies within the discretion of the trial court. MCL 768.5; MSA 28.1028; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994), amended on reh in part 447 Mich 1203 (1994). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates, through affidavit or by an offer of proof, that his substantial rights will be prejudiced and that the severance is necessary to rectify potential prejudice. *Id.* at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder conviction." *Id.* at 346-347. The standard is not lessened where the codefendant presents antagonistic defenses which have serious negative implications for the defendant. *Id.* "A trial court ruling on a pretrial motion must have concrete facts on which to base the ruling; mere finger pointing does not suffice." *Id.* at 355.

Here, before voir dire of the jury, the prosecutor brought a motion to consolidate defendant's trial with that of his codefendant, Hashim Williams. Defendant had no objection to consolidation. The prosecutor also brought a motion in limine to prevent Williams' use of the defense of duress, arguing that

duress is not a defense to homicide. The trial court indicated that it would “be prepared to address that issue well in advance of jury instructions.” During voir dire, William’s counsel asked the jury about duress and the prosecutor objected to the question. A discussion was held on the record after the jury was excused in which Nolan Wheeler’s testimony from William’s preliminary examination was presented as an offer of proof that duress was relevant. After further discussion, the trial court instructed the jury, during voir dire, that duress may be a potential issue and explained to the jury what duress is. Defendant’s attorney did not participate in these discussions. After the prospective jury left the room for the day, defendant’s counsel stated to the court that, “I have a serious concern as to whether or not the issue of duress does present a negative platform for Mr. Smith. Duress by who, is that question.”

Defendant moved for separate trials and/or separate juries at the start of proceedings the next day, arguing that defendant was entitled to a separate jury under *People v Brooks*, 92 Mich App 393; 285 NW2d 307 (1979) because Williams’ defense incriminated defendant. Defendant did not make an offer of proof or present an affidavit in support of his argument. The trial court found that the criteria for separate juries were not met and denied defendant’s motion.

In his oral request for severance, defendant did not present concrete facts which supported his contention that he would be prejudiced without a separate trial or jury. In the absence of proof that clearly, affirmatively, and fully demonstrated that defendant’s substantial rights were prejudiced and severance was necessary, the trial court did not abuse its discretion by denying defendant’s motion for severance.

Assuming, arguendo, that the trial court erred in denying defendant’s request, we conclude that any error was harmless. Defendant’s defense was essentially that he “was not there and he did not do anything.” However, Nolan Wheeler’s testimony was consistent in virtually all respects with Williams’ testimony. Even in the absence of Williams’ testimony, the prosecution presented overwhelming evidence of defendant’s guilt.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ E. Thomas Fitzgerald